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Case No. 92-2220

SUPREME COURT

OF THE UNITED STATES

October Term, 1993

ELMER RITTER and HELEN RITTER,

Petitioners,

v.

PEGGY S. ROSS, STEPHEN D. MEYER and ROCK COUNTY,

Respondents,

Petition for Writ of Certiorari
to the United States
Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Rooker-Feldman limitation on subject matter jurisdiction bars Petitioners from bringing constitutional claims in federal court when Petitioners were not parties to any prior state court proceeding because Petitioners did not receive adequate notice of the prior state court proceeding?

II. Whether application of the Rooker-Feldman doctrine by the Seventh Circuit Court of Appeals to the facts in this case is inconsistent with District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L.Ed 2d 206, 103 S.Ct 1301 (1983), and creates a conflict in the United States Circuit Courts of Appeals?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit dismissed this case in a published opinion decided May 7, 1993. Thereafter, Petitioners filed a timely Petition for Rehearing en banc with the Court of Appeals for the Seventh Circuit. In an Order Dated August 13, 1993, the Court of Appeals for the Seventh Circuit denied the Petition for Rehearing.

Jurisdiction of this Court to review the judgment by Writ of Certiorari is appropriate pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be

considered to be a statute of the District of Columbia."

U.S. CONST. amend. V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. XIV §1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rock County, Wis. Ordinance

See Appendix pp.26-39 for applicable sections of Wisconsin Statutes §75.521

STATEMENT OF CASE

On or about October 30, 1989, Elmer Ritter and Helen Ritter (hereinafter "Ritters") lost their real property for the alleged failure to pay $84.43 in property taxes. Under authority of a Rock County ordinance adopting the procedures of Wisconsin Statute §75.521, Rock County obtained a tax lien foreclosure judgment which judgment inter alia vested Rock County with an estate in fee simple absolute in the Ritters' real property.

Although Ritters believed the property taxes were paid, Ritters did not appear in the in rem foreclosure proceedings due to inadequate notice thereof. Rock County subsequently sold the property without notice to the

Ritters for an amount in excess of $17,000.00 and retained all proceeds.

At that time, Wisconsin Statute §75.521 provided that, an owner of any right, title or interest in land which was lost by judgment of foreclosure, may within two years from the date of entry of such judgment, bring an action in circuit court to recover the fair market value of the persons interest in land as of the date of the judgment of foreclosure if the circuit court determines that the land was unjustly foreclosed for one or more of the four following reasons:

1. the persons interest in such land was not subject to taxation, special assessment, special charge or special tax at the time of the levy of the tax, assessment or charge, for non-payment of which said lands were foreclosed;

2. that in fact such tax, special assessment, special charge or special tax was paid by said owner;

3. that the tax lien upon which the judgment of foreclosure in rem was based was barred by the statute of limitations;

4. such person lost said property through fraud without fault on his or her part.

Wis.Stats. §75.521 (89-90)

Section 75.521 does not provide for appeal of judgments of foreclosure in rem. At the time of the entry of judgment of foreclosure in rem, Wisconsin Statute §808.04 provided that an appeal to the Court of Appeals must be initiated within ninety (90) days of entry of the judgment of foreclosure. Wis.Stats. §808.04. The judgment of foreclosure was entered October 30, 1989. Helen Ritter first discovered the foreclosure judgment after February 16, 1990, when she

received a tax bill from Rock County that contained the name of the subsequent owner. Thus, when the Ritters first discovered their property had been foreclosed by Rock County and sold after judgment of foreclosure, the ninety (90) appeal period had run.

Ritters subsequently filed a seven count complaint in the United States District Court for the Western District of Wisconsin. Jurisdiction in the District Court was appropriate under 28 U.S.C. §1331 and 28 U.S.C. §1343 for Counts I - IV which allege violations of 42 U.S.C. §1983.

Counts I and II against Defendants Ross and Meyer respectively, allege a cause of action under 28 U.S.C. §1983 for deprivation of property without due process in violation of the Fourteenth Amendment of the United States

Constitution. The substance of Ritters allegation against Defendants Ross and Meyer is that said Defendants failed to provide Ritters with notice reasonably calculated to apprise Ritters of the pendency of the action and afford Ritters an opportunity to present their objection. The notice did not inform Ritters of their right to answer, appear, or otherwise contest the in rem action against their property.

Count III of the Ritters Complaint against Rock County asserts the same allegations with respect to the violations of Ritters constitutional rights as Counts I and II but Count III is based solely on Rock County's adoption of the ordinance establishing unconstitutional procedures for enforcing property tax liens in Rock County.

Count IV of Ritters' complaint states a cause of action against Rock County under the Civil Rights Act for taking Ritters' surplus property without just compensation in violation of the Fifth Amendment to the United States Constitution. Ritters' complaint also includes three pendent state claims which are not relevant to the issues raised on appeal.

The United States District Court for the Western District of Wisconsin dismissed the Ritter's complaint, holding that the Ritters due process claims were not ripe and could not be considered since the state's action is not complete until and unless it provides, or refuses to provide, a suitable post-deprivation remedy. The Ritters other 42 U.S.C. §1983 claim, alleging a violation of

their Fifth Amendment right that property not be taken without just compensation, was likewise dismissed by the district court as premature. (Dist. Court. Memorandum and Order, App. pp. 11-23).

Ritters subsequently appealed the District Court's Order and the decision issued by the Seventh Circuit Court of Appeals Court on May 7, 1993, affirmed the District Court dismissal but for lack of subject matter jurisdiction over the Ritters case based on the Rooker-Feldman doctrine. Since issues relevant to the Rooker-Feldman doctrine and its application to the facts in this case were not presented to the Seventh Circuit Court of Appeals, Ritters filed a Petition for Rehearing. The Petition was denied August 13, 1993. (Order, App. pp. 24-25).

ARGUMENT

I.

THE ROOKER-FELDMAN DOCTRINE DOES NOT APPLY TO THE FACTS IN THIS CASE

A. No Attempt to Appeal or Challenge a State Court Judgment

Counts I and II of Ritters' complaint challenge the procedures used by Defendants Ross and Meyer in providing Ritters with notice of the in rem foreclosure proceedings. This notice failed to meet the minimum due process requirements of the Fourteenth Amendment in that said notice failed to inform the Ritters that they had a right to a hearing or to be heard by filing an answer in the state court proceedings.

In its opinion in this case, the Seventh Circuit held "[i]t is settled that 'a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a

civil rights action.'" [citations omitted] Ritter v. Ross, 992 F.2d 750, 753 (7th Cir. 1993). Counts I and II of Ritters complaint clearly challenge the constitutionality of the notice provided to the Ritters and not the judgment itself.

However, even if Ritters' complaint could be construed as an attack on the state court judgment, Gauthier v. Continental Diving Services, Inc., 831 F.2d 559 (5th Cir. 1987) allowed such an attack in federal court without violating the Rooker-Feldman doctrine:

> We decline to apply Rooker-Feldman in a way that would require a federal court to give greater deference to a state court judgment than a court of the state in which the judgment was rendered would give it. For reasons explained below, we conclude that a Louisiana state court would permit Gauthier to attack the consent judgment. Consequently Rooker-Feldman does not bar his attack in federal court. Id. at 560.

Gauthier at least requires that a federal court consider whether the applicable judgment could be attacked in state court. The opinion of the Seventh Circuit in inconsistent with the holding in Gauthier v. Continental Diving Services, Inc., supra.

B. No Opportunity To Raise Constitutional Claims In Prior State Court Judicial Proceedings

The opportunity to raise a claim in prior state court proceedings is an important and well established requirement before Rooker-Feldman bars federal jurisdiction. District of Columbia Court of Appeals v. Feldman, (1983) 460 U.S. 462, at 482, footnote 16; Guess v. Board of Med. Examiners of State of N.C., 967 F.2d 998, 1003 (5th Cir. 1992); Leaf v. Supreme Court of State of Wisconsin, 979 F.2d 589, 597-598, (7th

Cir. 1992); United States v. Napper, 887 F.2d 1528, 1533 (11th Cir. 1989); Blue Cross and Blue Shield of Maryland, Inc. Weiner, 868 F.2d 1550, 1554-1555 (11th Cir. 1989); and Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983), cert denied, 467 U.S. 1210, 104 S.Ct. 2398 (1984).

Rooker-Feldman clearly does not bar constitutional claims by persons not parties to earlier state court litigation. Leaf v. Supreme Court of State of Wisconsin, supra, at 957-958; Valenti v. Mitchell, 962 F.2d 288, 298 (3rd Cir. 1992). It cannot be said that Ritters were parties to the in rem foreclosure proceedings when they never appeared or filed an answer in said proceedings.

In Wood v. Orange County, supra, the plaintiffs alleged that liens entered

against their property by Orange County, Florida, violated their due process rights. The plaintiffs in Wood were defendants in separate criminal cases. The plaintiffs were represented by a public defender and signed affidavits of insolvency containing a waiver clause, which clause informed plaintiffs of the possibility that a lien would be imposed against their property for the value of services rendered. Liens were subsequently obtained against the plaintiffs' property by Orange County without notice to the plaintiffs pursuant to the waiver of notice. Neither plaintiff participated in the lien proceedings. Plaintiffs in Wood alleged that they first received notice of the liens many months after the liens were imposed. Applying the Rooker-Feldman

doctrine to the facts in Wood, that court held:

> [T]here is an important limitation on this rule. The rule can apply only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings. Where the plaintiff has had no such opportunity, he cannot fairly be said to have "failed" to raise the issue. Moreover, an issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case. . .Finally interpreting Rooker to preclude a federal district court from considering an issue that the plaintiff had no reasonable opportunity to raise in state court might pose due process problems. Such a harsh rule might deprive the plaintiff of any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claim, a result arguably contrary to the requirements of due process. . .The crucial issue, therefore, is whether plaintiffs had a reasonable opportunity to raise their objections in the proceedings where the judgment creating the liens was entered and affirmed.
> Id. at 1547.

That Court held no such opportunity existed and Rooker-Feldman did not bar jurisdiction of plaintiffs due process

claims in federal court. Wood v. Orange County, supra, at 1546.

Likewise, Ritters did not have a reasonable opportunity to raise their federal claims in a prior state court proceeding. It is precisely this lack of opportunity which forms the basis of Ritters due process claims. If Ritters did have an opportunity to appear in the state court in rem tax foreclosure action, they would have no due process claims against Defendants, Ross and Meyer. Baring Ritters constitutional claims from federal court when they had no prior opportunity to raise these claims is an extreme deviation from the well established interpretation of Rooker-Feldman.

C. No Opportunity To Appeal Prior State Court Judgment

The defendants in the Wood case also argued that the plaintiffs could have raised their constitutional claims on appeal from the judgment creating the lien. That court held:

> Because plaintiffs did not receive actual notice of the judgment until well after the time for filing an appeal had elapsed, they lacked a reasonable opportunity to appeal the judgment.

Likewise, the Ritters did not receive actual notice of the foreclosure judgment until after the ninety (90) appeal period under Wisconsin law had elapsed. Therefore, Ritters has no "reasonable opportunity" to appeal the foreclosure judgment.

Like Wisconsin, Florida law also provided plaintiffs in Wood with a procedure for filing an objection to set aside the final judgment creating the

lien. The Wood court also addressed the plaintiffs opportunity to collaterally attack the judgment creating the lien:

> A Rule 1.540 motion is not a substitute for appeal, and the court deciding such a motion does not act as an appellate court. [citation omitted] The rule permits a special kind of collateral attack on, rather than an appeal of, the judgment. . . Because Rule 1.540 proceedings are not part of the process of appellate review of the original judgment, it does not matter for purposes of Rooker that plaintiffs could have raised their claims in such proceedings. The federal court may perform a role that a state court deciding a Rule 1.540 motion might also be able to perform. But the federal court is not usurping the role of the state appellate court because a state court deciding a Rule 1.540 motion does not act as an appellate court ... Rooker is not a requirement that a plaintiff exhaust all conceivable state remedies; it does not require that where possible he institute proceedings so that state courts can consider the plaintiff's federal claims in the first instance. The important point is that plaintiffs lacked a reasonable opportunity to raise their claims in the proceedings surrounding entry of the judgment. Id. at 1549.

Ritters complaint contains a pendent state claim pursuant to Wisconsin Statutes §75.521 which states that the allegedly delinquent property taxes in the amount of $84.83, were in fact paid by Ritters. Pursuant to the holding in Wood, this cause of action is not a substitute for appeal. Even if Ritters did not have a specific basis to collaterally attack the foreclosure judgment under Wisconsin Statutes §75.521, Ritters would still have a due process claim which they should be allowed to bring in federal court. Potential plaintiffs in these two situations should not be treated differently.

D. Constitutional Claims Are Not Inextricably Intertwined With Prior State Court Proceedings

In Feldman, this court held "[i]f

the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding . . .then the District court is in essence being called upon to review the state-court decision. This the District Court may not do." Dist. Col. Court of Appeals v. Feldman, supra, at 223, fn. 16. The Wood Court recognized that the federal courts do not have subject matter jurisdiction over issues that are raised in state court proceedings and "inextricably intertwined with the state court judgment". Wood, supra at 1547. The meaning of "inextricably intertwined" is further explained by the Wood Court not to include issues which the parties did not have an opportunity to raise in the state court proceedings. Id. at 1547.

In the present case, Ritters raised no issues in state court proceedings. Therefore, their federal claims cannot be "inextricably intertwined" with issue(s) raised in state court.

E. Constitutional Rights Were Violated By Administrative And Legislative Actions Of Rock County And Rock County Employees

Count III of Ritters' complaint challenges the constitutionality of the Rock County Ordinance on its face. This ordinance provides for a procedure which does not meet the minimum requirements of due process. It is not the judgment of foreclosure which the Ritters attack but the constitutionality of the ordinance providing for foreclosure procedures and enforcement. The opinion on appeal does not address Ritters challenge to the constitutionality of the Rock County Ordinance.

Ritters also assert a claim against Rock County in Count IV of their complaint alleging an unconstitutional taking of their surplus property, the difference between the amount of back taxes allegedly due and owing to Rock County plus any administrative costs and the amount which Rock County received in the subsequent sale of the Ritter's land.

The Rooker-Feldman doctrine clearly does not apply to the Ritters constitutional challenge to the Rock County Ordinance on its face or to the Ritters claim of an unconstitutional taking without just compensation. Razatos v. Colorado Supreme Court,746 F.2d 1429, 1433-1434 (10th Cir. 1984); Centifanti v. Nix, 865 F.2d 1422, 1428 (3rd Cir. 1989); Valenti v. Mitchell, 962 F.2d 288, 298 (3rd Cir. 1992); and

Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224, 226 (7th Cir. 1993).

In District of Columbia Court of Appeals v. Feldman, supra, Feldman challenged the D.C. Court of Appeals' denial of his petition requesting a waiver for admission to the District of Columbia bar. Feldman alleged that the court's failure to grant a waiver thus denying him admission to the bar violated his constitutional rights. Regarding this issue, the United States Supreme Court held that the U.S. District Court had no subject matter jurisdiction to the extent that Feldman sought review of the D.C. Court of Appeals denial of his petition for a waiver. Id at 482.

Feldman's district court complaint also challenged the constitutionality of a District of Columbia rule regarding bar admissions. Addressing Feldman's

challenge to the constitutionality of the rule, the Supreme Court held:

> To the extent Hickey and Feldman mounted a general challenge to the constitutionality of Rule 46I(b)(3), however, the District Court did have subject matter jurisdiction over their complaints . . . Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States District Court to review a final state court judgment in a judicial proceeding. Instead, the District Court may simply be asked to assess the validity of a rule promulgated in a non-judicial proceeding. Id. at 482-486.

Like Feldman's constitutional challenge to the D.C. Circuits bar admission rule, Ritters' complaint raises a challenge to the constitutionality of the Rock County Ordinance.

In Leaf v. Supreme Court of State of Wisconsin, 979 F.2d 589 (7th Cir. 1992), the court discussed the state court judicial proceedings requirement of the Rooker-Feldman doctrine.

> A district court, however, may have jurisdiction when the litigant's challenge is not directed at a state court's judicial proceedings but rather involves a state court's administrative, legislative, or ministerial actions. Id., at 596 to 597.

In reviewing the constitutionality of the Rock County Ordinance, the federal district court would not be reviewing a final judgment of a state court - a challenge which could only be brought to the United States Supreme Court pursuant to 28 U.S.C. §1257.

Nor does the Ritters' Fifth Amendment takings claim require a federal district court to review a final state court judgment. Ritters allege that Rock County unconstitutionally retained surplus funds received from the subsequent sale of the Ritter property. In fact, the takings claim could not be a challenge to a state court judgment because at the time of entry, the county

had not yet sold the land, much less retained the surplus funds.

> The state court judgment does not, by itself, cause a deprivation of property within the meaning of the Fourteenth Amendment. The deprivation is not complete until the judgment is enforced, and under the governing statute, the county has authority to enforce the judicially created liens. Wood v. Orange County, 715 F.2d 1543 (1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984).

Enforcement of the judgment of foreclosure in rem against the Ritter property was clearly done by and through administrative actions and procedures by Rock County. Ritters constitutional challenge to the retention of surplus funds by Rock County is not an attack on the state court judgment itself. Thus, the federal district court does not lack subject matter jurisdiction to hear this constitutional claim.

Dismissal for lack of subject matter jurisdiction by the Seventh Circuit of

Ritters constitutional challenge to the Rock County Ordinance and administrative procedures is such a departure from the holding in Feldman and its subsequent cases, that this creates a special and important reason for review by the Supreme Court.

II.

APPLICATION OF THE ROOKER-FELDMAN DOCTRINE TO THE FACTS IN THIS CASE IS INCONSISTENT WITH FELDMAN AND CREATES A CONFLICT IN THE CIRCUIT COURTS OF APPEALS

Whether a constitutional issue is inextricably intertwined with a matter plaintiffs raised or could have raised in a state court proceeding, is one of the factors to be applied in determining if a district court lacks subject matter jurisdiction under the Rooker-Feldman doctrine. Prior to the appellate decision in this case, the Rooker-Feldman

limitation on federal subject matter jurisdiction required a reasonable opportunity to raise constitutional issues in state court. This decision established a new standard to determine if Rooker-Feldman applies and the plaintiffs are precluded from bringing their constitutional claim in federal court, the "but for" test. Ritter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993). Holding: "[b]efore this court the Ritters admit that but for the tax lien foreclosure judgment in Rock County Circuit Court they would have no complaint; they would still have their land and would have suffered no injury." Id. at 754. This "but for" test, clearly a deviation doctrine, would close the doors of the federal courthouse to many with meritorious constitutional claims.

Application of the "but for" rule to any facts will result in a finding that the state court proceedings were "judicial" and "inextricably intertwined" with the constitutional claims. In Feldman, "but for" the decision of the D.C. Court of Appeals denying his admission to the bar, Feldman would have no injury. But, the Supreme Court in Feldman held that even though Feldman had an opportunity to be heard in a state court proceeding, to the extent that Feldman presented a general challenge to the constitution-ality of the bar rule, the district court did have subject matter jurisdiction. District of Co. Court of Appeals v. Feldman, supra. Likewise, in Wood v. Orange County, but for the state court proceedings which imposed a lien on the plaintiff's

property, the plaintiffs would have no injury.

The Seventh Circuit's deviation from the well established "inextricably intertwined" standard to a "but for" standard changes the meaning of the Rooker-Feldman doctrine and raises serious constitutional issues which should be addressed by the Supreme Court to resolve the conflict in the Circuit Courts of Appeals created by this case.

CONCLUSION

The decision in this case creates a "Catch-22" situation for the Ritters which precludes the Ritters from ever bringing their constitutional claims in federal court. Wood v. Orange County, supra, at 1547, raised this concern when that court held that due process problems may arise if Rooker-Feldman can bar a

claim for lack of subject matter jurisdiction, without a reasonable opportunity to raise the constitutional issues in prior state court proceeding.

The appellate decision suggested that Ritters have state court "options" available to contest the foreclosure judgment. The District Court held Ritters constitutional claims were not ripe due to adequate state post-deprivation remedies. However, if the Ritters first chose to collaterally attack the in rem foreclosure judgment in state court pursuant to the allowed claim that the taxes were in fact paid, and if Ritters lost is state court, then Rooker-Feldman clearly would bar any constitutional claim in federal court because Ritters would have had an opportunity to raise the federal issues

in the state court action collaterally attacking the judgment.

The decision rendered in this case expands the Rooker-Feldman doctrine by applying a "but for" test to determine if a state court judgment deprived persons of their constitutional rights. This new standard raises serious and important constitutional issues which should be reviewed by the Supreme Court.

Respectfully Submitted,

Petitioners

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Dated: November 10, 1993

APPENDIX

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Wisconsin Statutes §75.521 26-39

In the

United States Court of Appeals

For the Seventh Circuit

No. 92-2220

ELMER RITTER and HELEN RITTER,

Plaintiffs-Appellants,

v.

PEGGY S. ROSS, County Treasurer for Rock County, Wisconsin, STEPHEN D. MEYER, Corporate Counsel for Rock County, Wisconsin and ROCK COUNTY, a body politic in the State of Wisconsin,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 91 C 925—**John C. Shabaz,** *Judge.*

ARGUED JANUARY 27, 1993—DECIDED MAY 7, 1993

Before COFFEY and EASTERBROOK, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge.*

WOOD, JR., *Senior Circuit Judge.* "For want of a nail the shoe is lost, for want of a shoe the horse is lost, for want of a horse the rider is lost." George Herbert, in *Bartlett's Familiar Quotations* 270 (Emily M. Beck ed., 15th ed. 1980). And for want of $84, a homesite was lost. Specifically, for allegedly failing to pay $84.43 in back taxes, Elmer and Helen Ritter may have permanently lost thirty-eight acres in Rock County, Wisconsin.

I.

In 1982, the Ritters purchased an undeveloped tract of land for $30,000, intending it to serve as the site for their retirement home. In 1986 the county treasurer, Peggy Ross, notified the Ritters they still owed a part of their 1984 property taxes for this tract. The Ritters claimed they had paid the full amount by money order and sent Ross a copy of that order. Despite this and other correspondence, the two sides failed to reach an agreement.

On December 15, 1988, Ross sent the Ritters a letter stating that "the County will be taking this property because of back taxes." On July 14, 1989, the County acted on its stated intention. Ross and Stephen Meyer, Rock County's Corporate Counsel, commenced proceedings in rem to foreclose tax liens against the Ritters' property based on the $84.43 of allegedly unpaid 1984 property taxes.

One week later, the Ritters received from the County a "Notice of Commencement of Proceedings In Rem to Foreclose Tax Liens by Rock County." This document ran forty pages and included a "List of Tax Liens of Rock County Being Foreclosed." The list included 108 parcels; the Ritters' parcel was number forty-seven and appeared on page twenty. The notice indicated that September 24, 1989, was the last day for redemption by payment of taxes; the document did not advise the Ritters that they had a right to contest the proceedings.

The Ritters did not contact the Defendants or an attorney and did not file an answer in the foreclosure proceeding. Plaintiffs explain their inaction by stating that they are "unsophisticated in legal matters" and that they never saw their name or their property on the list of tax liens.

On October 30, 1989, the County obtained a tax lien foreclosure judgment in the Rock County Circuit Court. On December 1, 1989, the County sold the property to a third party for $17,345 and kept the entire amount. It was not until February 1990 that the Ritters discovered

the County had acquired and then sold their property. Subsequent to this revelation, the Ritters had their bank trace the money order they reportedly sent to pay their taxes; they found it had never been cashed.

The Ritters filed a seven-count complaint against Ross, Meyer, and Rock County on October 30, 1991, in federal district court. The Ritters alleged that Ross and Meyer each violated 42 U.S.C. § 1983 by depriving the Ritters of property without due process. These charges stem from the "Notice of Commencement of Proceedings In Rem to Foreclose Tax Liens by Rock County," which the Ritters claim failed to provide them with notice of the pendency of the foreclosure action and of their opportunity to object. The Ritters also charged Rock County with the same violation, based solely on the County having adopted the ordinance that established the procedures for enforcing property tax liens. In addition, Plaintiffs claim Rock County violated the civil rights statute by taking property without just compensation in violation of the Fifth Amendment. The County did this, said the Ritters, by keeping all the proceeds from the foreclosure sale, not just the amount owed for taxes.[1] The additional counts were pendent state claims.

Defendants moved for summary judgment on March 12, 1992, asserting the notice of the foreclosure proceedings was adequate, that a tax lien foreclosure does not implicate the Fifth Amendment, and that adequate post-deprivation remedies were available which precluded Plaintiffs' constitutional claims. In response, the district court dismissed all of the Ritters' claims without prejudice.

The district court concluded the Ritters' constitutional claims were not "presently viable" as the Plaintiffs "failed to pursue state post-deprivation remedies." Wisconsin law provides the Ritters with a number of options to recover

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[1] At oral argument the state advised that the Wisconsin delinquent tax procedures have now been modified, but this case is not affected by those subsequent changes.

their land or the money from its sale, and the district court felt it could not gauge whether Plaintiffs had been deprived of their constitutional rights until the Ritters exhausted those options. Having dismissed these claims, the court also dismissed Plaintiffs' state law claims without prejudice for lack of subject matter jurisdiction.

II.

On appeal, the Ritters argue they are not required to proceed with state post-deprivation remedies before bringing an action under the Civil Rights Act; they request this court reverse the district court and remand the cause for adjudication. We must first examine whether the district court, and indeed this court, has subject matter jurisdiction. Our examination starts by asking a question not addressed by either party or the court below, and that is whether the *Rooker-Feldman* doctrine stands as a bar to the litigation of this dispute in federal court. *See Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 284 n.7 (7th Cir. 1990) (this court on its own motion may raise issue of subject matter jurisdiction); Fed. R. Civ. P. 12(h)(3) (same).

III.

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the plaintiff sought to overturn a state court decision which had been affirmed by the state's supreme court and then denied review by the United States Supreme Court. Plaintiff filed a complaint in federal district court alleging the state court decision rested on an unconstitutional state statute. The district court ruled it had no jurisdiction over the suit and the Supreme Court agreed: "[N]o court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original." *Id.* at 416 (citations omitted).

In declaring the district court to be without jurisdiction, the Supreme Court noted the validity of the state court decision. The state circuit court had jurisdiction of the subject matter and the parties, it conducted a full hearing, and the judgment was responsive to the issues. *Id.* at 415.

Sixty years later, the Court reaffirmed *Rooker* in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *Feldman* concerned two lawyers, Hickey and Feldman, who wished to become members of the District of Columbia bar. The lawyers petitioned the District of Columbia Court of Appeals for a waiver of the bar admission rule which required applicants to have graduated from an accredited law school. The D.C. Court of Appeals, the functional equivalent of a state's highest court, denied their petitions. Plaintiffs then filed complaints in United States district court challenging the denial of their petitions and the constitutionality of the bar admission rule.

In their complaints, Plaintiffs alleged the D.C. Court of Appeal's refusal to waive the bar admission requirement violated the Fifth Amendment in that it deprived them of liberty and property without due process of law. Plaintiffs also asked for a declaration that the bar requirement, as applied or on its face, violated the Fifth Amendment. The district court dismissed their complaints for lack of subject matter jurisdiction, asserting that to do otherwise would place it in the position of reviewing an order of a jurisdiction's highest court. *Id.* at 470. The district court explained that " 'the admission and exclusion of attorneys by the members of the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court.' " *Id.* at 473 (citation omitted).

The Supreme Court agreed that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *Id.* at 482. The Court also agreed that the proceedings in the D.C. Court of Appeals were judicial in nature. *Id.* at 479. "Therefore, to

the extent that Hickey and Feldman sought review in the District Court of the District of Columbia Court of Appeals' denial of their petitions for waiver, the District Court lacked subject-matter jurisdiction over their complaints." *Id.* at 482. The Court stated, however, that the district court did have subject matter jurisdiction over plaintiffs' complaints "[t]o the extent that Hickey and Feldman mounted a general challenge to the constitutionality" of the D.C. bar admission rule. *Id.* at 482-83.

In short, the *Feldman* Court held that United States district courts may review a state court's nonjudicial action for constitutional error, but not a state court's judicial decision whether or not constitutional error is alleged:

> United States district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court.

Id. at 486.

Taken together, *Rooker* and *Feldman* stand for the proposition that "lower federal courts lack jurisdiction to engage in appellate review of state-court determinations." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 21 (1987) (Brennan, J., concurring); *accord Asarco Inc. v. Kadish*, 490 U.S. 605, 622 (1989) ("The *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court.").

This statement, of course, should not be read out of context. Congress does allow federal district courts to review state judicial decisions in habeas corpus proceedings. *See*

28 U.S.C. § 2241 (habeas corpus); *Lynk v. LaPorte Superior Court*, 789 F.2d 554, 563 (7th Cir. 1986) (noting habeas corpus exception). One commentator states that *Rooker-Feldman* "simply forbids federal district court appellate review of state court judgments in the guise of collateral attacks when no federal statute authorizes such review." James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2008 n.46 (1992).

Engaging in an impermissible appellate review may occur when a district court is asked to entertain a claim that was not even argued in the state court but is "inextricably intertwined" with the state court judgment. *Feldman*, 460 U.S. at 483 n.16; *see also Guess v. Board of Medical Examiners*, 967 F.2d 998, 1002-03 (4th Cir. 1992) (Plaintiffs who lose in state court may not "recast their claims in federal court under the guise of federal constitutional claims that were not raised or decided by the state court . . . if the constitutional claims are inextricably intertwined with the merits of the state court judgment.").

There is, unfortunately, no bright line that separates a federal claim that is "inextricably intertwined" with a state court judgment from a claim that is not so intertwined. The crucial point is whether "the district court is in essence being called upon to review the state-court decision." *Feldman*, 460 U.S. at 483-84 n.16. Do the constitutional claims, then, force a district court to assume appellate jurisdiction over the state court judgment? Justice Brennan, the author of *Feldman*, stated his belief in *Pennzoil* that the inferior federal courts are not forced into this impermissible appellate review when the constitutional claims are " 'separable from and collateral to' the merits of the state-court judgment." *Pennzoil*, 481 U.S. at 21 (Brennan, J., concurring) (citation omitted). *See generally Leaf v. Supreme Court of Wisconsin*, 979 F.2d 589, 598-600 (7th Cir. 1992) (discussing the "inextricably intertwined" standard).

It is clear, though, that a constitutional claim is not "inextricably intertwined" merely because it could have been raised, but was not, in the earlier state proceeding. If the opposite were true, the Court would not have allowed the litigants in *Feldman* to bring their general constitutional challenges to the bar admission rule in federal district court. This conclusion is further buttressed by *Pennzoil*, where separate concurrences by a majority of the Court indicated *Rooker-Feldman* would not automatically bar a federal claim that was not raised in the state court. *See Pennzoil*, 481 U.S. at 18 (Scalia & O'Connor, JJ., concurring); *id.* at 21 (Brennan, J., concurring); *id.* at 28 (Blackmun, J., concurring); *id.* at 31 n.3 (Stevens, J., concurring). *But cf. Leaf*, 979 F.2d at 600-01 (res judicata may bar claims where *Rooker-Feldman* does not).

With this understanding of the *Rooker-Feldman* doctrine, we now turn to the Ritters' appeal.

IV.

It is settled that "a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." *Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984), *cert. denied*, 474 U.S. 968 (1985); *accord Guess v. Board of Medical Examiners*, 967 F.2d 998, 1005 (4th Cir. 1992) ("Artificial attempts to redefine the relief sought are not sufficient to overcome the requirements of *Feldman.*"); *Owens-Corning Fiberglas Corp. v. Moran*, 959 F.2d 634, 635 (7th Cir. 1992) (section 1983 does not automatically permit federal court to review state judicial decision); *Worldwide Church of God v. McNair*, 805 F.2d 888, 893 (9th Cir. 1986) (*Feldman* applies in § 1983 context); *Lynk v. LaPorte Superior Court*, 789 F.2d 554, 563 (7th Cir. 1986) (federal courts rebuff efforts to retry state suits in federal courts under section 1983).

We must distinguish whether the Ritters are asking a federal court to review the state court judgment through

use of their section 1983 action or instead are mounting a general challenge to the Wisconsin statute which authorized the foreclosure of the tax lien. The Tenth Circuit aptly noted that "the distinction is often difficult to draw." *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). This difficulty is evinced by the varying outcomes courts reach when faced with similar facts. *See* Gary Thompson, Note, *The* Rooker-Feldman *Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 Rutgers L. Rev. 859, 880 n. 95, 881 n. 98 (1990) (listing conflicting court decisions).

Before this court the Ritters admit that but for the tax lien foreclosure judgment in Rock County Circuit Court they would have no complaint; they would still have their land and would have suffered no injury. The state court proceedings, as the Plaintiffs themselves state, "are the subject of this case." Appellants' Reply Br. at 5. The Ritters, like the plaintiff in *Rooker*, are essentially seeking a federal district court appellate review of a state judicial proceeding; their claims against Defendants are inextricably intertwined with the merits of that proceeding. As in *Rooker*, the lower federal courts have no jurisdiction over this complaint. *See Leaf v. Supreme Court of Wisconsin*, 979 F.2d 589, 598 (7th Cir. 1992); *see also Guess*, 967 F.2d at 1003-04 ("A plaintiff may not relitigate in federal court a particularized challenge to an adjudication against him in state court.").

Even if the *Rooker-Feldman* doctrine were no bar to the Ritters' action, we would feel compelled to dismiss their complaint. As Judge Shabaz noted, there are a variety of options available to the Ritters in Wisconsin state courts to either overturn the state court foreclosure judgment or to recover the proceeds from the sale of their land; the Ritters, in fact, have told us they are currently involved in state court litigation concerning the foreclosure.

V.

We conclude both this court and the district court lack subject matter jurisdiction over the Ritters' case and we therefore affirm the district court's dismissal of both their state and federal claims. Any relief for the Ritters must come from the Wisconsin judicial system and not from us.

Although we do not have jurisdiction over the present appeal, we must admit our surprise and dismay that the dispute over the Ritters' alleged back taxes was not solved in Rock County. For want of $84.43, both the Ritters and the County have now invested more money and time without a resolution of the dispute.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ELMER RITTER AND HELEN RITTER,

Plaintiffs,

v.

PEGGY S. ROSS, County Treasurer for Rock County, Wisconsin, STEPHEN D. MEYER, Corporate Counsel for Rock County, Wisconsin, and ROCK COUNTY, a body politic in the State of Wisconsin,

Defendants.

MEMORANDUM AND ORDER
91-C-925-S

Plaintiffs Elmer and Helen Ritter bring this action pursuant to 42 U.S.C. §1983 alleging that the defendant Rock County, its Corporate Counsel, Stephen D. Meyer, and Treasurer, Peggy S. Ross, violated plaintiffs' constitutional rights in foreclosing a real estate tax lien. Plaintiffs also assert several claims under

state law seeking to void the foreclosure judgment or recover the value of the property from the defendants.

The matter presently comes before the Court on defendants' motion for summary judgment. Jurisdiction is based upon 28 U.S.C. §1331. The following is a summary of undisputed facts.

FACTS

Plaintiffs Elmer and Helen Ritter purchased certain real estate in Rock County, Wisconsin, in 1982, which was subject to general property taxes. In 1984 the property was assessed taxes in the amount of $710.00. Plaintiffs made certain payments to defendant Rock County for 1984 property taxes.

Plaintiffs received tax bills for tax years 1985, 1986, 1987 and 1988, each of which stated at the tope center, "Redemption

Taxes Due." On December 15, 1988, defendant Ross sent a letter to plaintiff Elmer Ritter which stated in part:

> According to our records you still owe taxes back to 1984.
>
> The County will be taking this property because of back taxes. If your records show that they are paid, please bring to this office or send copies of the receipts.

In response to this letter plaintiff Helen Ritter replied indicating her belief that taxes were paid in full.

On January 3, 1989, defendant Ross sent a letter to plaintiff Elmer Ritter summarizing tax records which indicated a remaining balance of $84.43 for the tax year 1984.

On July 14, 1989, defendants filed a petition in Rock County Circuit Court for a Proceeding in Rem to Foreclose Tax Liens by Rock County. This action was taken pursuant to Rock County Ordinance which provided that

the County proceed under Wis. Stat. §75.521 to enforce tax liens. A copy of the entire petition and a list of 108 parcels to be foreclosed under the petition were sent to plaintiffs and received by them on July 21, 1989. The petition provided that September 27, 1989 was the last day for redemption by payment of taxes.

Plaintiffs made no attempt to contact defendants or an attorney and did not file an answer in the foreclosure proceeding. On October 30, 1989, defendant Rock County obtained a tax lien foreclosure judgment vesting it with an estate in fee simple absolute to plaintiffs' property. Defendant Rock County sold the property on December 1, 1989 for $17,345.00.

MEMORANDUM

Plaintiffs claim that under the procedure followed by the defendants the

notice of foreclosure they received was insufficient to meet the due process requirement of the Fourteenth Amendment. They further claim that by taking title to property valued at over $17,000.00 in payment of $84.00 in back taxes defendants violated their Fifth Amendment right against the taking of property without just compensation. Defendants now move for summary judgment, asserting among other things that the notice received by the plaintiffs was adequate, that a tax lien foreclosure does not implicate the Fifth Amendment, and that adequate post-deprivation remedies are available which preclude the constitutional claims.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has

reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure.

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecesary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

The Court finds as a matter of law that the constitutional claims advanced by the

plaintiffs are not presently viable, plaintiffs having failed to pursue state post-deprivation remedies.

Due Process Claim

The essence of plaintiffs' due process claim is that they received inadequate notice advising them of the existence of the foreclosure proceeding and their right to participate. Plaintiffs contend that the notice they received was not reasonably calculated to inform them of the action against the property because the list contained a description of 108 parcels of real property and the notice document consisted of over 41 pages. Because of the voluminous nature of the notice plaintiffs allege that they were misled and confused and did not realize that their property was subject to foreclosure.

Wisconsin Statute §75.521(3)(c), the procedure pursued by the defendants in the foreclosure action, provides that "[a] copy of the petition and so much of the list of tax liens as shall include the description of a particular parcel shall be mailed by registered or certified mail . . ." Plaintiffs allege that by including the entire list of tax liens the notice they received was inadequate and not in compliance with the procedure specified in the statute.

Plaintiffs also assert that the notice was inadequate because it did not inform them of their right to appear and answer and participate in the foreclosure proceeding. However, based upon the facts in the record, it seems highly unlikely that this alleged error had any impact upon the loss of the property by the plaintiffs. As plaintiffs'

attorney noted in his letter to the defendants,

> The Ritters, who are 65 years old and unsophisticated in legal matters, never saw their name or their property on the list. If they had, they obviously would have paid the $84.43 in order to protect their property.

Clearly, the fact that the plaintiffs were allegedly unaware that their property was being foreclosed is the alleged critical error in the notice. As plaintiffs concede, had they been aware that their property was involved in the foreclosures they would have paid the $84.43.

An unauthorized deprivation of property by a state employee, "does not constitute a violation of the procedural requirements of the due process clause of the Fourteenth Amendment if a meaningful post-deprivation for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). This is

because the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy. Id. Because the plaintiffs allege that the notice they received was not in compliance with the prescribed notice procedure of the Wisconsin Statutes, the defendants' action was the type of unauthorized conduct to which Hudson v. Palmer applies.

Since the plaintiffs are pursuing a variety of state remedies which would correct any unlawful taking of property, the due process claim is not ripe. Under Wisconsin law a judgment of foreclosure is void where a county fails to fully comply with the requirements of §75.521. "Absence strict compliance, it violates due process clause to allow such a government taking." Foreclosure of Tax Liens v. Young, 106 Wis.2d 244, 251, 316 N.W.2d 362 (1982).

Under such circumstances a plaintiff may seek relief from the judgment or order pursuant to § 806.07, Wis. Stat. Id. Additionally, § 75.521(14a) permits the plaintiffs to recover the value of their property if they can establish, as they allege, that the tax in question had been paid. Finally, the plaintiffs assert several other common law state actions against the defendants, all seeking to remedy their deprivation. Under these circumstances it cannot be determined that the state will fail to provide an adequate remedy for the taking of plaintiffs' property. Since the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy, plaintiffs' due process claim is not ripe and cannot be considered by this Court.

Taking Without Just Compensation

Similarly, a property owner has not suffered a violation of the just compensation clause of the Fifth Amendment until the owner has unsuccessfully attempted to obtain such compensation through the procedures provided by the state. Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985). Because of the numerous state remedies pursued or available it cannot be determined whether state procedures will compensate plaintiffs for the taking of their property. Until they pursue their state remedies any claim under the Fifth Amendment is premature.

State Claims

The sole basis for this Court's jurisdiction is the existence of a federal question under 28 U.S.C. § 1331. Because

the Court concludes that both of plaintiffs' constitutional claims are premature, it follows that this Court is without jurisdiction to hear the remaining pending state claims. United Mine Workers v. Gibbs, 383 U.S. 715 (1955). Each of the plaintiffs' claim will be dismissed without prejudice pending a pursuit of the state remedies available to them.

ORDER

IT IS ORDERED that plaintiffs' Constitutional claims are DISMISSED without prejudiced.

IT IS FURTHER ORDERED that plaintiffs' claims under state law are DISMISSED without prejudice for lack of subject matter jurisdiction.

Entered this 28th day of April, 1992.

BY THE COURT:

JOHN C. SHABAZ
District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 13, 1993

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. HARLINGTON WOOD, JR., Senior Court Judge

No. 92-2220	) Appeal from the United States District Court for the Western District of Wisconsin.
ELMER RITTER AND HELEN RITTER,	)
Plaintiffs/Appellant	) No. 91 C 925
v.	) John C. Shabaz, Judge.
PEGGY S. ROSS, County Treasurer for Rock County, Wisconsin, STEPHEN D. MEYER, Corporate Counsel for Rock County, Wisconsin, and ROCK COUNTY, a body politic in the State of Wisconsin,	) ORDER
Defendants/Appellees	)

On consideration of the petition for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellants on May 21, 1993, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *in banc* be, and the same is hereby, DENIED.

Wisconsin Statutes §75.52(3)

COMMENCEMENT OF PROCEEDING TO FORECLOSE TAX LIEN.

(a) Whenever any land has been included in a tax certificate, the treasurer may file in the office of the clerk of the circuit court of the county, one or more lists of parcels of property affected by unpaid tax liens as shown on the tax certificates in the treasurer's office. The treasurer may file the list when any of the following time periods elapses after the date of the tax certificate:

1. One year, if razing, removing and restoration of the site to a dust-free and erosion-free condition costs incurred by any city or village are included in the amount due for taxes.

2. One year, if the tax certificate is held by any city authorized to proceed under s.74.87 or by any county that has a population of 500,000 or more.

4. Two years, if none of the conditions specified in subds. 1 and 2 applies.

(am) The parcels shall be numbered consecutively in the list prepared under par.(a). The list shall be known as the "List of Tax Liens of....County Being Foreclosed by Proceeding in Rem 19.., No...." and shall bear the following caption:

'STATE OF WISCONSIN
CIRCUIT COURT
...COUNTY

In the matter of the foreclosure of tax liens under section 75.521 Wisconsin Statutes by ....County, List of Tax Liens for 19.., Number ....". The list shall contain as to each parcel, the following:

1. A brief description sufficient to identify each parcel affected by such tax lien. The description shall state the lot, block and section number of any parcel upon any tract, the plat or map of which is filed in the office of the register of deeds of such county. If the lands be unplatted an engineer's metes and bounds description shall be a sufficient description.

2. The name or names of the last owner or owners, and mortgagee or mortgagees of such parcel as such ownership or mortgage interest appears of record in the office of the register of deeds of the county wherein such parcel is situated, and the state of Wisconsin where it has a determined but unpaid inheritance tax lien, a filed, nonoutlawed income tax warrant or a docketed judgment, all in the county where such parcel is situated.

NOTE: Subd.2 is amended by 1987 Wis.Act.27, eff.1-1-92, to read:

"2. The name or names of the last owner or owners and mortgagee or mortgagees of the parcel as the ownership or mortgage interest appears of record in the office of the register of deeds of the county in which the parcel is situated, and the state of Wisconsin if it has a determined but unpaid death tax lien, a filed, nonoutlawed income tax warrant or a docketed judgment, all in the county where the parcel is situated."

3. A statement of the amount of the principal sum of each tax lien in the hands of the country treasurer, together with the date from which and the rate at which interest shall be computed on said principal sum.

4. A petition to the court for judgment vesting title to each of said

parcels of land in the county, as of the date of entry of judgment and barring any and all claims whatsoever of the former owner or any person claiming through and under him since the date of filing the list of tax liens in the office of the clerk of the circuit court.

5. The names of all municipalities, other than the foreclosing county, having any right, title or interest in the land or in the tax liens or in the proceeds thereof.

(b) Such list of tax liens shall be verified by the affidavit of the county treasurer and shall be posted in his office. The filing of such list of tax liens in the office of the clerk of the circuit court shall constitute and have the same effect as the filing and recording in the office of the register of deeds of such county of a separate and individual notice of the

pendency of such proceeding as to each parcel described in such list, and likewise, not withstanding any other provision of law, shall constitute the commencement of a special proceeding by the county against each parcel of real estate therein described and have the same effect as the filing of an individual and separate petition or complaint by the county against each parcel of real estate therein described to enforce the payment of the tax liens against such property.

(c) A copy of the petition and so much of the list of tax liens as shall include the description of a particular parcel shall be mailed by registered or certified mail, return receipt requested, by the county treasurer to the last-known post-office address of each owner and mortgagee of record, the state of Wisconsin in the

instances specified in par. (am) 2, and to each municipality, other than the foreclosing county, having any right, title or interest in the land or in the tax liens or the proceeds thereof. An affidavit of the treasurer setting forth the names of the owners, mortgagees, the state of Wisconsin in the proper case and municipalities for whom a post-office address has been ascertained, giving the addresses and stating that notice was mailed, giving the date of mailing, and stating that no present post-office address was ascertainable for the other owners and mortgagees, shall be filed and constitute full compliance with this paragraph.

Wisconsin Statutes §75.521(6)

PUBLIC NOTICE OF IN REM PROCEEDING. Upon the filing of such list in the office of the clerk of the circuit court, the

county treasurer forthwith shall prepare a notice that such list of tax liens and petition has been so filed and a copy thereof posted in the office of said county treasurer. The treasurer shall cause such notice, together with the list of tax liens and petition, to be published as a class 3 notice, under ch. 985. Such notice shall be in substantially the following form:

NOTICE OF COMMENCEMENT OF PROCEEDING

IN REM TO FORECLOSE TAX LIENS

BY ....COUNTY

(Here insert list of tax liens and petition as filed in office of clerk of the circuit court.)

TAKE NOTICE That all persons having or claiming to have any right, title or interest in or lien upon the real property described in the list of tax liens, No....., on file in the office of the clerk of the

circuit court of ..... county, dated ....., and hereinabove set forth, are hereby notified that the filing of such list of tax liens in the office of the clerk of the circuit court of .... county constitutes the commencement by said .... county of a special proceeding in the circuit court for .... county to foreclose the tax liens therein described by foreclosure proceeding in rem and that a notice of the pendency of such proceeding against each piece or parcel of land therein described was filed in the office of the clerk of the circuit court on ... (insert date). Such proceeding is brought against the real property herein described only and is to foreclose the tax liens described in such list. No personal judgment will be entered herein for such taxes, assessments or other legal charges or any part thereof.

TAKE FURTHER NOTICE That all persons having or claiming to have any right, title or interest in or lien upon the real property described in said list of tax liens are hereby notified that a certified copy of such list of tax liens has been posted in the office of the county treasurer of ... county and will remain posted for public inspection up to and including ... (here insert date at least 8 weeks from the date of the first publication of this notice) which date is hereby fixed as the last day for redemption.

TAKE FURTHER NOTICE That any person having or claiming to have any right, title or interest in or lien upon any such parcel may, on or before said ...(insert redemption final date), redeem such delinquent tax liens by paying to the county treasurer of ...county, the amount of all such unpaid tax

liens and in addition thereto, all interest and penalties which have accrued on said unpaid tax lien, computed to and including the date of redemption.

...County
By...
County Treasurer

Wisconsin Statutes §75.521(14a)

DAMAGES. Any person who was the owner of any right, title or interest in land which was lost by judgment of foreclosure as provided in this section may within 2 years from the date of entry of such judgment, in the cases hereinafter mentioned other than fraud and within 6 years in the case of fraud, commence an action in the circuit court against the county to recover the fair market value of the person's interest therein at the date of entry of said judgment of foreclosure in rem. If the court determines that such person's right,

title and interest in said land was unjustly foreclosed and lost because said person's interest in such lands was not subject to taxation, special assessment, special charge or special tax at the time of the levy of the tax, assessment or charge, for nonpayment of which said lands were foreclosed, or that in fact such tax, special assessment, special charge or special tax was paid by said owner, or that the tax lien upon which the judgment of foreclosure in rem was based was barred by the statute of limitations, or if such person lost said property through fraud without fault ion his or her part, the court shall determine the fair market value of said land or of said person's interest therein as hereinabove set forth. The fair market value shall not exceed the amount arrived at by dividing the assessed

valuation of such lands in the year in which such judgment in rem was entered by the percentage ratio of real estate assessments prevailing for the taxing district in which the lands were located as set forth in the equalization for state tax purposes of the same year. The court shall award judgment to such plaintiff in such amount, together with a reasonable attorney's fees to be fixed by the court, and the plaintiff's costs and disbursements of such action. The amount awarded the plaintiff shall be reduced by the total amount due, as of the date of entry of such judgment, for all current taxes and upon all tax certificates held by the county on such date that the court shall find were valid. Upon payment of the judgment the county may charge back as a tax to any taxing district the amount which such district received from the county

in payment of taxes and interest on said land either by distribution of proceeds of sale thereof by the county or though other payment by the country to the extent that it exceeds the amount distributable to such district had the same been based upon the payment of the taxes and interest found by the court to be properly payable at the time of the entry of the judgment of foreclosure and applied in reduction of the amount awarded to the plaintiff hereunder.

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QUESTIONS PRESENTED

I. Did the issues decided by the District Court and Court of Appeals properly fall within the general policy of Federal Courts non-intervention in state matters, even though the claims are presented using a section 1983 format?

II. Should this Court and lower federal courts exercise jurisdiction over a local real estate tax collection matter alleging section 1983 claims, when the Petitioners have available to them, and are in fact pursuing, an adequate post-deprivation remedy in state court?

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ELMER RITTER and HELEN RITTER,

Petitioners,

v.

PEGGY S. ROSS, STEPHEN D. MEYER and ROCK COUNTY,

Respondents,

Reply In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

The respondents Peggy S. Ross, Stephen D. Meyer and Rock County respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 992 F.2d 750 (1993) and Appellant Appendix pp 1-10.

REVISION OF STATEMENT OF THE CASE

Rock County, Wisconsin adopted the procedure set forth in Wisconsin Statute Section 75.521 as its exclusive remedy for collection of delinquent real estate taxes. It is an in rem procedure which permits the County to proceed against the land that is subject to the tax if the tax is delinquent for more than three years. The tax foreclosure proceeding is commenced annually by the County Treasurer against all properties with delinquent taxes of more than three years. The foreclosure proceeding is a Circuit Court action captioned "In the Matter of the Foreclosure of Tax Liens Under Section 75.521 Wisconsin Statutes by Rock County", receiving a case number and an assigned judge. The foreclosure matter is commenced with a petition and notice of petition, the form of which is statutorily prescribed. The

statutes require that the notice of petition and petition be:

(a) published weekly for six weeks;

(b) each person holding an interest in the real estate sought to be foreclosed must receive a copy of the petition and notice of petition by certified mail, return receipt requested.

The Petition, requests that the Court enter a judgment vesting title to the delinquent parcel in the County, as of the date of entry of judgment, and barring all claims of the former owner or any person claiming under them. The notice of the petition informs the interest holder that the holder has until a specified date to redeem the delinquent tax liens.

Wisconsin Statutes section 75.521(7) provides that an interest holder may file an answer to the petition objecting to the proposed foreclosure. By the same statute the objection is limited to the specific

defenses that:

(1) the land was not liable for taxation;

(2) the tax was in fact paid;

(3) the tax lien is barred by the Statute of Limitations.

The answer to the petition of the County must be filed within 30 days after the last date of the period for redemption stated in the Notice of Petition.

Those parcels that are not redeemed by the end of the redemption period or an answer not filed within 30 days thereafter by an interest holder proceed to judgment of foreclosure. Prior to the final hearing a guardian-ad-litem is retained by the Circuit Court to attempt to notify all persons who have not redeemed the parcels of the upcoming hearing. A hearing date is set and on that date all parcels which have not been redeemed or an answer entered are subject to a judgment of foreclosure which

vests title in Rock County. Subsequently, Rock County attempts to dispose of all lands it has acquired through the foreclosure process at a statutorily authorized and advertised public auction. The Wisconsin foreclosure statutes section 75.521(14)(a) provides that within two years from the date of entry of the judgment of foreclosure any person who was the owner of an interest in the land which was lost by judgment of foreclosure may commence an action in Circuit Court against the County to recover the fair market value of the person's interest at the date of entry of the judgment of foreclosure. The plaintiff must allege and show that any of the following exist:

(1) the land was not subject to taxation;

(2) the tax had been paid by the owner;

(3) the tax lien was barred by the

statute of limitations;

(4) or that the person lost the property through fraud without fault on his or her part.

Appellants Elmer Ritter and Helen Ritter (hereinafter "Ritter's") admit having received a copy of the County's Petition and Notice of Petition notifying them of the pendency of the action, that Rock County was foreclosing on their property and the final date for redemption. The Ritter's claim that the foreclosure procedure was constitutionally insufficient because the Wisconsin foreclosure statutes do not require that the notice of petition or petition advise the interest holder of the opportunity to enter an answer to the petition. The Notice that the Ritter's received advised them of the pendency of the foreclosure, the right to redeem and its consequences but did not contain a recitation of Wisconsin statute section

permitting them to answer.

The Ritters did nothing after receiving the Notice and Petition. Later, after the Ritter's allegedly "discovered" that the foreclosure process had been completed, they:

(a) did not appeal the judgment of foreclosure;

(b) did commence a state court action for damages pursuant to Wisconsin Statute 75.521(14a).

At the same time that they commenced the State Circuit Court action, they commenced an action against Rock County, it's Treasurer (Ross) and it's attorney (Meyer) in Federal District Court.

The decision of the Federal District Court for the Western District of Wisconsin on motion for summary judgment, was that the Ritter's federal action should be dismissed because the Ritter's due process claims were not "ripe" and could not be

considered since the state action was not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy. The District Court found that there was an adequate remedy being pursued by the Ritter in the pending Wisconsin State Circuit Court action. On appeal to the Seventh Circuit Court of Appeals, the Court of Appeals decided the issue in favor of Rock County using a different rationale, the Rooker-Feldman doctrine. In its decision, the Court of Appeals determined that the federal action was most likely a collateral attack on the circuit court action of judgment of foreclosure and thus was an appropriate instance in which to apply the Rooker-Feldman bar to federal jurisdiction.

In the meantime, the Ritter's had requested the Circuit Court of Rock County stay their state court action for damages,

pending the outcome of the federal action.

ARGUMENT

I.

THIS COURT MUST DECLINE TO EXERCISE JURISDICTION OVER THE RITTERS CAUSES OF ACTION UNTIL STATE ACTION HAS BEEN COMPLETED OR THERE HAS BEEN PROVEN TO BE A LACK OF AN ADEQUATE STATE REMEDY

Whether this Court considers the rationale of the District Court or the rationale of the Seventh Circuit Court of Appeals or the rationale of the Tax Injunction Act, 28 U.S.C. 1341, advanced by appellees in their brief in opposition to motion for rehearing en banc in the Seventh Circuit, the concensus of all three doctrines is that the federal courts should not exercise jurisdiction, especially in matters of local taxation, where the state provides for a speedy, efficient and adequate post deprivation remedy or in the state courts. The Wisconsin Statutes

provide for such a remedy through either an appeal of the foreclosure action or the commencement of a seperate action for damages in state court, an option which the Ritter's are currently pursuing. Section 1983 claims may be pressed in state court actions.

The Ritters' federal action must be viewed as either:

(a) a collateral attack upon the state court's judgment of foreclosure, or

(b) a direct attack upon the constitutionality of the Wisconsin Delinquent Tax Foreclosure Statute as it relates to notice.

The merits of the Ritters' claim of lack of due process due to lack of actual notice of the right to answer the petition for foreclosure is based upon the Ritter's belief that the Due Process Clause requires that the Ritter's be given not only notice of the pendency of an action to foreclose, but that the notice be overlayed with

another constitutional right, the right to be notified of the contents of the Wisconsin Statute that they have the opportunity to object to the petition using the permissible defenses set forth in Wisconsin Statute Section 75.521(7). Conversly, Appellees believe that the constitutional requirements for notice are clear, and that all that is required of a notice of tax lien foreclosure to meet the due process requirement is "a notice reasonably calculated, under all the circumstances, to apprise the holder of a legally protected interest in the property of the pendency of the action, and to afford the interest holder an opportunity to present his or her objections. Mennonite Board of Missions v. Adams, (1983) 462 US 791, 103 S.Ct. 2706, 77 L.Ed.2d 180. (Emphasis added.) The State must make efforts to provide actual notice

of the pendency of the action to all interested parties. The Wisconsin Statute foreclosure proceeding is in rem making the land answer for delinquent real estate taxes. The primary object of the statute is to reach the land which has been assessed. The constitutional notice requirement has been determined to be satisfied by mail service to the person having an interest in the land. See the discussions of The Supreme Court's Construction of Due Process Requirements Regarding Notice in Proceeding to Foreclose Real Property Tax or Similar Lien found at Anno, 77 L.Ed.2d 1485 and Anno 1 L.Ed.2d 171. No cases cited therein require that an interest holder be given more notice than the fact that the action has been commenced for foreclosure of the tax lien. There is no overlay requirement of notifying the interest holder of what

additional statutory rights they may have.

In any event, the Ritter's section 1983 argument that there is an additional requirement of notice of right to defend can and should be thoroughly explored in the pending Wisconsin State Court action.

Adequate Post-Deprivation Remedy
in State Court
(District Court Decision)

The United States District Court for the Western District of Wisconsin's decision dismissing the Ritter complaint held that the Ritter's due process claims were not ripe and could not be considered since "the state's action is not complete until and unless it provides, or refuses to provide, a suitable post-deprivation remedy." (Appellant Appendix p. 21) The District Court found that there was an adequate remedy being pursued by the Ritters in the pending Wisconsin State

Court action for damages. The issue of whether the state was providing a suitable post-deprivation remedy was briefed by both Petitioner/Appellants and Respondent/Appellees in the Seventh Court of Appeals. However, the Seventh Circuit founded its decision on lack of federal jurisdiction on another doctrine, on the Rooker-Feldman doctrine, and made no comment on the rationale used by the District Court.

Collateral attack on Judgment of Foreclosure (Rooker-Feldman Doctrine)

The Court of Appeals Decision in this matter posed the question of whether or not to apply the Rooker-Feldman doctrine to this case in stating:

> "We must distinguish whether the Ritters are asking the Federal Court to review the State Court Judgment through use of their section 1983 action or instead are mounting a general challenge to the Wisconsin Statute which

> authorized the foreclosure of the tax lien." Ritter v. Ross, No. 92-2220 Slip Op. at pp 8-9 (7th Cir. May 7, 1993).

The Court of Appeals decison determined that under the circumstances and facts alleged, the Ritters were asking the Federal Court to collaterally attack the State Court judgment of foreclosure through use of their section 1983 action. Ritter v. Ross, supra, Appendix, p. 9.

The Ritters argue that the Rooker-Feldman doctrine was misapplied by the Seventh Circuit because it is the Ritter's belief that they have a constitutional right to notice of the statutory right to answer a Petition for Tax Foreclosure, the lack of which deprived them of their opportunity right to appear in the state foreclosure action. This is a somewhat specious argument in that the Ritters admit that they received notice of the pendency of the

action and that the County was foreclosing for delinquent taxes. Any person possessed of nominal common sense would, if believing they had paid the tax, make objection to such a petition. In support of their contention, the Ritters allege that Wood v. Orange County, 715 F.2d 1543 (1983) cert. denied, 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984) controls. In Wood, it was found that Rooker-Feldman could not apply in an instance where liens were obtained against the plaintiff's property by Orange County without the knowledge of the plaintiffs (the interest holders). The lynch pin of the Wood v. Orange County case is the statement cited at page 22 of Appellant's Petition:

> "Because plaintiffs did not receive actual notice of the judgment until well after the time of filing an appeal had elapsed, they lack the reasonable opportunity to appeal the judgment."

The facts of the case Wood were that the plaintiffs had no notice of the imposition of liens on their property. Wood can be distinguished because the Ritter's did receive notice of delinquent tax liens on their property and did receive notice of the pendency of the foreclosure action. They claim only that they failed to receive notice of their opportunity to answer the petition. The Wisconsin Statutes give them the right to appear and answer.

Property owners are presumed to know and are given constructive knowledge of tax assessment and collection procedures by reason of their ownership of land. See Annotations at 1 L.Ed.2d 171, supra, and 77 L.Ed.2d 1485, supra. In addition, the Ritters had actual notice of the pendency of the foreclosure action. It would be pure speculation for this Court to determine what the Ritters might have done

had the Notice they received recited the statutory opportunity to answer the Petition for Foreclosure. Such a determination should be made as a part of the factual determinations in the state court proceeding, not upon procedural constitutional grounds in federal court. The Wood v. Orange County case rests upon a constitutional challenge to the lack of notice of the imposition of a lien on property whereas the Ritter's constitutional challenge is directed to an alleged lack of actual (as opposed to constructive) notice of right to answer. The Wood v. Orange County case is not analogous and is distinguishable.

Additionally, the Circuit Court's decision approved the District Court's dismissal of the Ritter's complaint because, even if the Rooker-Feldman doctrine is inapplicable "as Judge Shabaz

noted, there are a variety of options available to the Ritters in Wisconsin state courts to either overturn the state court foreclosure judgment or to recover the proceeds from the sale of their land". (Ritter v. Ross, supra, at p. 9)

THE TAX INJUNCTION ACT

The Seventh Circuit Court of Appeals decision was based upon a determination that the Ritters were collaterally attacking the state court judgment through the use of their section 1983 action as distinguished from "a general challenge to the Wisconsin Statute which authorized the foreclosure of the tax lien". (Ritter v. Ross, supra, p. 9). Thus, if the Ritter's are determined to be not collaterally attacking the State Court judgment of foreclosure, or for some other reason the Rooker-Feldman doctrine is not applicable, the Ritter's cause of action must be a

direct attack on the constitutionality of the Wisconsin Tax Foreclosure Statute, particularly that section which requires notification of the commencement of the foreclosure action by mail notice but does not specifically require that the notice specify the interest holder's statutory opportunity to enter an objection to the petition. Indeed the Ritter's argue that the Rooker-Feldman doctrine is misapplied because they are in fact thereby prevented from mounting a constitutional challenge. (Petition For Writ of Certiorari, p. 21).

If the issue is framed as a challenge to the Rock County Ordinance adopting the Wisconsin State Law on tax lien foreclosure, the Federal District Court lacks subject matter jurisdiction by reason of the Tax Injunction Act, 28 U.S.C. Sec. 1341. Therein it is provided that the Federal District Court shall not "enjoin,

suspend or restrain the assessment, levy or collection of any tax under State law if a plain, speedy and efficient remedy may be had in the courts of such state." The act is applicable to section 1983 actions raising federal constitutional claims. Schneider Transport, Inc. v. Cattanach, 637 F.2d 129 (7th Cir. 1981) cert. denied, 455 U.S. 909, 102 S.Ct. 1257, 71 L.Ed.2d 448. Fair Assessment In Real Estate Association v. McNary, supra.

Reflecting the imperative need of a state to administer its own fiscal operations, the Tax Injunction Act's essential policy is that state and local tax systems should not be subjected to federal judicial scrutiny. Federal Court relief that interferes with state and local taxation policy, whether directly or indirectly is normally barred by section 1341. Brooks v. Nance, 801 F.2d 1237 (10th

Cir. 1986). Fair Assessment in Real Estate Association v. McNary, supra at p. 103. Rosewell v. LaSalle National Bank, (1981) 450 US 503, 101 S.Ct. 1221, 67 L.Ed. 464.

The Federal District Court and the Circuit Court of Appeals decisions determine by implication that the Wisconsin State foreclosuure statutes provide a "plain, speedy and efficient remedy" satisfying minimal procedural criteria. Fromm v. Rosewell, 771 F.2d 1089 (7th Cir. 1985).

A case in point on the application of the Tax Injunction Act to a constitutional challenge on the basis of lack of notice in a tax foreclosure proceeding is Coon v. Teasdale, 567 F.2d 820 (8th Cir. 1977). The Missouri Statutes provided a method of foreclosing tax delinquencies on real estate to establish marketable title free of tax liens. Plaintiff Coon alleged that

the statutes violated the due process clauses of the fifth and fourteenth amendments by providing for the taking of property without proper notice to the property owner. The Court stated:

> "The State Statutes provide a method for collection of state taxes and clearly fall within the scope of 28 U.S.C. Section 1341. Under these circumstances, a federal injunction is prohibited if there is an adequate state remedy...and the mere allegation of unlikely success in a state court does not render the state remedy inadequate for purposes of 28 U.S.C. Section 1341." Coon v. Teasdale, supra, 822.

Coon alleged lack of personal or actual notice of the tax foreclosure sale. As to this fundamental due process right and its apparent absence, the court stated:

> "If these allegations are true, we are confident that under current decisions of the United States Supreme Court the Missouri courts will not ignore these contentions. Constitutional claims are as cognizable in state courts as in federal courts..." Coon v. Teasdale, supra, 822.

The 8th Circuit Court of Appeals found the Tax Injunction Act to be a limitation on the jurisdiction of federal courts.

MOOTNESS

The Ritters have argued that if they had been provided with an alleged constitutionally required notice of right to answer the petition, they would have answered that they had paid the tax. This is the same answer that they have made in the state court action which is now pending. If the Ritters are successful in the state court action in proving that they did pay the tax, the entire federal court proceeding would be rendered moot. If they do not prevail in the pending state action, they have the opportunity to press their constitutional arguments through the state court system and from there to the United States Supreme Court. Judicial economy and federal court policy requires that this

matter be pursued through the state court system.

CONCLUSION

The Ritters are either: (1) attacking the state court judgment of foreclosure or, (2) mounting a constitutional challenge to the adequacy of notice of the Wisconsin Statutes relating to the tax lien foreclosure in federal court while an adequate state remedy is available and is being pursued. Either challenge is barred by federal court policy of non-interference in state actions, whether it be on the basis of the availability of alleged state post deprivation remedy or the Rooker-Feldman doctrine or the Tax Injunction Act. See generally, Moore's Federal Practice par. 2.207 at 2286 (2nd Ed. 1977). As found by the Court of Appeals, the Ritters have available to them several options in the Wisconsin State Court System, including

pressing of the action that they currently have pending in the Rock County Circuit Court. In that action, the Ritters may press their section 1983 claims. The Ritters have available to them an opportunity for a full hearing and judicial determination at which they may raise any and all constitutional objections to the collection of the tax.

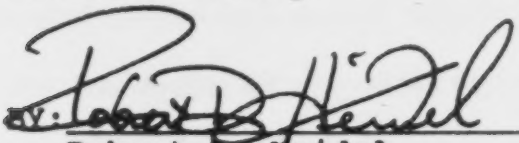
For the foregoing reasons, appellees respectfully request that this Court deny the Writ of Certiorari and affirm the Seventh Circuit Court of Appeals and District Court's decision dismissing the Ritter's complaint for failure of federal subject matter jurisdiction. Any relief for the Ritters must come from the

Wisconsin judicial system and not from the federal courts.

Respectfully submitted,

Respondents

Peggy S. Ross, Stephen D. Meyer and Rock County



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